Filed 7/31/02 Ashley G. v. Superior Court CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

ASHLEY G., Petitioner, v. THE SUPERIOR COURT OF CONTRA COSTA COUNTY, Respondent; CONTRA COSTA COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES et al., Real Parties in Interest.	A098632 (Contra Costa County Super. Ct. No. J01-02268)

Josiah G. was born in 2001, and is a dependent child of the Contra Costa County Juvenile Court. His mother, Ashley G., seeks writ review of the juvenile court's order to set a hearing to select and implement a permanent plan for the child (Welf. & Inst. Code, § 366.26.)[1] She contends that the court erred in taking jurisdiction and in denying reunification services at the disposition hearing. We grant the petition for extraordinary writ on the latter point and remand the matter for a new disposition hearing.[2]

---

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

[2] Section 366.26, subdivision (*l*), bars review on appeal if the aggrieved party has not made a timely writ challenge to an order setting a selection and implementation hearing. The statute also encourages the appellate court to determine all such writ petitions on their merits, as we do here. (§ 366.26, subd. (*l*)(4)(B).)

Background

The Contra Costa County Department of Children and Family Services (the Department) filed a petition on November 28, 2001, alleging failure to protect, and no means of support. (§ 300, subds. (b), (g).) A jurisdiction/disposition report filed January 24, 2002, contained the following information in support of the petition.

The mother, born in 1983, gave birth to the child when she was 17 years old and incarcerated in the California Youth Authority at Camarillo. She had a criminal history of committing a public nuisance (loitering with the intent to commit prostitution) in July 1999, and for carjacking, possession of narcotics, fighting in a public place, and exhibiting a deadly weapon in June 2001. She was serving a commitment not to exceed 10 years 7 months for the latter offenses. She will be eligible to be considered for parole in May 2004.

The mother turned the child over to her mother, Mirium D. (the grandmother). On November 26, 2001, officers responded to the grandmother's home for a welfare check. Officer Hooker knocked several times. The grandmother's adult son Michael then opened the door with a key. The officer announced herself, called the grandmother's name several times, and searched for her. She found her lying at the foot of a bed tangled in a comforter, face down on the floor with her head under the bed. Officer Hooker removed the comforter and continued calling her name, with no response. There was a strong smell of alcohol. The officer called an ambulance. The grandmother ultimately awoke but was unable to stand. When attempting to stand she fell onto the bed in a sitting position. Her speech was extremely slurred and made no sense, but she was able to communicate that she had no medical problems and did not want medical attention. She said she had a lot to drink and was drunk. Her behavior was erratic, alternating between calm and aggressive.

About 25 to 30 minutes passed after the grandmother regained consciousness before she became concerned about the whereabouts of the children. Once she was advised her son Michael had the children, she stated, "The kids are gone. WooHoo." The officer arrested her for child endangerment. (Pen. Code, § 273a.)

The "Jurisdiction/Disposition Report" states that if called to the stand, the grandmother's 10-year-old son, Demario, would testify as follows. On November 26, 2001, his mother, the grandmother, was drinking gin and hitting the older children. When she was drunk and did not know what she was doing she would slap them. She did not hurt the babies because Demario took them with him into the bedroom and locked the door. When he does this the grandmother usually yells and bangs on the door for a while and then leaves. Demario then feeds the babies and puts them to bed. This happened once a week or more. On November 26, she got mad at him and threw a can at his head, but he ducked and it missed him. She said she hated him and called him "yellow mother-fucker." He knows his mother does not mean what she says when she is drunk. This night when his mother passed out on the bed he took her drink and dumped it out. She fell on the floor and never woke up. She does not drink in the morning and Demario goes to school every day. But if she had been drinking he would stay home from school because he would be worried about the babies.

A report filed March 5, 2002, reiterated the above information and the Department's recommendation that no reunification services be offered. At the jurisdiction hearing on March 5, 2002, the grandmother's social worker, Becky Nelson, testified that the grandmother had been in a treatment program since the November 26, 2001, incident, and had been regularly tested. The Department was considering recommending that the grandmother's children be returned to her. She had been incarcerated, but was no longer.

At the time of the hearing the mother had been unable to find a suitable caregiver for the child. Her counsel argued that because the grandmother had tested positive only for a legally prescribed medication, she was "not drinking and is safe." The court disagreed and found the grandmother was not an adequate caregiver, having not shown a lengthy period of sobriety. The court upheld the petition.

The Department reported at a hearing on April 16, 2002, that the grandmother's own child, Daniel F., had been permitted to return to her home. Attorney Patricia Thomas, representing the child, argued that he should not be returned to the grandmother,

who had a long history of four dependencies and of being unwilling to attend counseling or classes which might help, all of which had contributed to the mother herein being placed with an aunt.

The mother's attorney argued that the child should be raised by his family and therefore should be placed with the grandmother, whom he was visiting every other weekend, and who had taken him to visit his mother in jail. The court expressed that it found this argument persuasive in light of the grandmother's progress in rehabilitation. Ms. Thomas noted, however, that the mother could not reunify with the child within the statutory six-month time limit and that the grandmother had a charge pending against her for willful cruelty to a child.

Social worker Becky Nelson testified that the Department was looking for a concurrent home for the child, because he is adoptable and the Department deemed a more permanent placement preferable. The Department deemed the grandmother's home inappropriate because of her history of dependencies with her other children, Michael, Ashley and Demario. She had just received her own child back, and giving her another young child would add too much stress for her to succeed and would set up both her and the child for failure. Ms. Nelson believed that reunification services should not be offered to the mother, because it would be detrimental to the child to have to wait two more years to reunify with his mother. He could not reunify with her before that time.

The mother's attorney urged that if the child was not placed with the grandmother, he should be placed with the aunt (Abigail) with whom the mother had previously been placed. However, Ms. Nelson introduced evidence that the aunt did not properly supervise children in her care. For example, there were substantiated reports that while in the aunt's home the mother slept in the same bed with her 16-year-old male cousin.

The mother testified that when she was at the Youth Authority, she had only two visits with the child, one in September and one in October. She later testified to visits every weekend when she was in local custody. She felt they had a bond. She planned to finish high school and live with her mother until she got on her feet. If her mother (the grandmother) should have a relapse, the mother would take custody of the child and her

younger brother and send Demario to his father. In the meantime, while she is in CYA, she wanted the child to return to the grandmother's house.

After hearing argument and reviewing the reports, the court found by clear and convincing evidence that given the statutory factors and the six-month time limit established in section 361.5, subdivision (a), as well as the mother's minimum eligible parole date of 2004, providing reunification services to the incarcerated mother would be detrimental to the child (§ 361.5, subd. (e)(1)). However, in light of the grandmother's progress in rehabilitation, the family bond with the child, and the statutory preference for relative placement (§ 361.3), the court ordered placement with the grandmother, contingent on her continuing compliance with her family maintenance plan. The court set a section 366.26 hearing for July 30, 2002. After hearing oral argument in this case we ordered that hearing stayed pending our decision.

Discussion

Taking Jurisdiction

The mother contends that because she was able to arrange care for the child with a caregiver "who was only temporarily unsuitable," the trial court erred in taking jurisdiction on March 5, 2002. On that date the court was aware that the jurisdiction decision should be based on the facts as they existed at that time, not on the earlier date when the petition was filed. The court found that the grandmother was not an adequate caregiver at the relevant time of the hearing, because of the deplorable things she had done to the children, and because she had not yet had a sufficiently lengthy period of sobriety.[3]

The court's decision to take jurisdiction was supported by the evidence, which we have summarized above, offered by Demario and by the police who conducted the welfare check. At the time of the jurisdiction hearing the grandmother's own children had not yet been returned to her. The court properly found that the child came within the

[3] It is noteworthy that, by contrast, at the time of disposition (some six weeks later) the court found the grandmother did have such a sufficient period of sobriety and placed the child with her.

jurisdiction of the court because the mother was incarcerated and "[could] not arrange for the care of the child." (§ 300, subd. (g).)

The mother suggests, without citation to authority, that it was improper to find jurisdiction under section 300, subdivision (b), based upon a third party's conduct that the mother could not reasonably have anticipated. The record does not support the mother's bald statement that she could not have anticipated her mother's habitual alcohol abuse. The point is not well taken. The wording of the statute itself provides the answer: The child comes within the jurisdiction of the court if "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his . . . parent . . . to adequately supervise or protect the child, or the willful or negligent failure of the child's parent or guardian to adequately supervise or protect the child from the conduct of the custodian with whom the child has been left . . . ." The evidence strongly supported the court's finding under this statute.

Reunification Services

The mother contends that the child regularly and successfully visited her in custody, and that the other evidence provided no specific basis for a finding that providing reunification services would be detrimental to the child. We agree.

The trial court's role and our standard of review are as follows. Where a parent is incarcerated, the court must order reasonable reunification services "unless the court determines, by clear and convincing evidence, those services would be detrimental to the child." (§ 361.5, subd. (e)(1).) On review we do not reweigh the evidence, but determine "whether, viewed in the light most favorable to the judgment, there is substantial evidence to support the juvenile court's finding. [Citation.] All conflicts must be resolved in favor of the respondent, and we must indulge in all reasonable inferences which support the finding." (*In re Joshua H.* (1993) 13 Cal.App.4th 1718, 1728.)

Applying this standard we find that there was a lack of substantial evidence from which the trial court could properly find clear and convincing evidence of detriment to the child if the mother were given reunification services. At worst the court may have been able to find lack of benefit to the child, but that does not amount to detriment.

The Legislature established seven factors for the trial court to consider in making its determination of detriment under section 361.5, subdivision (e)(1). The factors relevant to this case were the age of the child, the degree of parent-child bonding, the crime and length of sentence and any detriment to the child if services are not offered.

The evidence before the trial court showed that the child was seven months old. The mother expressed a strong belief that the child had bonded with her, even though he had been removed from her in the hospital after his birth and there had been only a few visits. The mother was sentenced for up to 10 years 7 months for carjacking. There was no evidence of any detriment to the child if services were not offered. The trial court recited that it had considered these factors in finding that offering reunification services would be detrimental to the child, but it did not cite evidence in support of that finding. The record does not contain evidence negating the mother's testimony that she and the child had bonded. The record does not show what aspects, if any, of the mother's crime had a detrimental effect on the child. The child's young age alone was not substantial evidence that he would suffer detriment if his mother were given reunification services. (*In re Dylan T*. (1998) 65 Cal.App.4th 765.) The length of the mother's sentence does not necessarily mean that the child will not ultimately be returned to her. (*In re Monica C.* (1995) 31 Cal.App.4th 296, 308-310.) This is particularly true in light of the fact that the child has been returned to the care of the grandmother, who had played a central role in preserving the ties of the child and the mother. (*Ibid*.)

Conclusion

Let a peremptory writ of mandate issue commanding the Contra Costa Superior Court to do the following: (1) vacate its order of March 5, 2002, in *In re Josiah G*. (J01-02268), finding that providing reunification services to the mother would be detrimental to the child and setting a hearing to select and implement a permanent plan for the child under Welfare and Institutions Code section 366.26, and (2) hold a new disposition hearing in accordance with the views expressed in this opinion.

Our decision is final in this court immediately. (Cal. Rules of Court, rule 24(d).) The stay of the section 366.26 hearing which was previously set for July 30, 2002, shall

remain in effect until the remittitur issues.

_____
Swager, J.

We concur:

_____
Marchiano, P. J.

_____
Stein, J.